Supreme Court, U.S.
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Case No. 84-1773

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PINE HILL CIVIC CLUB, INC., ET AL.
Appellants,

v.

DEKALB COUNTY, GEORGIA, ET AL.
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

APPELLEES' MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

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QUESTIONS PRESENTED

I. WHETHER THIS APPEAL IS IN A PROPER POSTURE TO BE HEARD AND DECIDED BY THIS COURT

II. WHETHER THE SUPREME COURT LACKS JURISDICTION OVER THIS APPEAL DUE TO THE ABSENCE OF A SUBSTANTIAL FEDERAL QUESTION

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STATEMENT OF FACTS

This is an appeal from a unanimous decision of the Georgia Supreme Court upholding the constitutionality of a County ordinance which requires three types of notice to be given for public hearings in connection with rezoning applications. The ordinance requires that notice of the public hearings be given (1) by publication in the County newspaper at least ten days prior to the hearing; (2) by posting a sign at a conspicuous place on the property at least fifteen days prior to the hearing; and (3) by sending mail notice to all abutting property owners in Dekalb County as shown by the County's tax records. DeKalb County, Ga., Code Section 11-2367 (1980).

Appellee, Toco Hill, Inc. ("Toco Hill"), as seller, entered into a

contract with Appellee, The Calibre Company of Georgia, Inc. ("Calibre"), as purchaser, to sell 6.9 acres of real property located on Shady Valley Road, DeKalb County, Georgia (the "Property"). The contract was contingent upon the rezoning of the Property. On March 24, 1983, Calibre filed an application asking that the Property be rezoned from R-85, which allows single family detached dwelling units, to R-100 (Conditional) for the purpose of constructing residential condominiums. In order to give all interested parties notice of the public hearings to be held by the Planning Commission and the Board of Commissioners, DeKalb County placed the appropriate advertisements in the County newspaper concerning the time, place and location of the hearings. The County

also posted a sign at a conspicuous location on the Property advertising the public hearings. Finally, written notification concerning the time, place and location of the public hearings was mailed to each DeKalb County property owner whose property abutted the subject Property (as shown by the County's tax records). The public hearings were properly conducted, and on May 24, 1983, the DeKalb County Board of Commissioners voted to rezone the Property from R-85 to RA-8, a classification which will allow the development of eight attached or detached residential dwelling units per acre.

Appellants Glen E. Moorehouse and Rosemarie Morwessel own properties in Fulton County which abut the Property. All of the Property is situated in Dekalb County, but it abuts property in

the adjacent County of Fulton. Because Appellants Moorehouse and Morwessel did not own abutting property in Dekalb County, as shown by that County's tax records, the County did not mail them a written notice of the public hearings. They could have learned about the hearings from the published notice or the sign on the Property as these were the methods of notice provided to the community in general. Appellant Moorehouse did learn about the public hearings and attended at least one of them. Appellant Morwessel did not see the sign on the Property, read the published notice, or otherwise determine when or where the public hearings would take place.

Appellants brought suit in the Superior Court of DeKalb County to have the DeKalb County Commission's rezoning

resolution declared invalid on the grounds that the Board of Commissioners abused its discretion by rezoning the Property and on the grounds that Appellees Moorehouse and Morwessel had not been given proper notice of the public hearings on the rezoning petition. Appellants Moorehouse and Morwessel asserted that they had been denied their state and federal due process and equal protection rights since they were not provided notice by mail of the public hearings while abutting property owners in DeKalb County were given notice by mail of the hearings.

The Supreme Court of Georgia reversed the trial court's grant of Appellants' motion for summary judgment and the denial of Appellees' motion for summary judgment as to the notice

issue. The case has been remanded for trial on the remaining issue of whether the Board of Commissioners manifestly abused its discretion in rezoning the Property to an RA-8 classification.

Appellants have filed this appeal pursuant to 28 U.S.C. §1257(2) (1966), alleging that they have been denied their due process and equal protection rights since they did not receive notice by mail of the public hearings, pursuant to the DeKalb County Zoning Ordinance.

ARGUMENT AND CITATION OF AUTHORITY

I. The Appeal is not in a Proper Posture to be Heard and Decided by this Court

An examination of the procedural posture of this case reveals that Appellants' federal substantive claim against Appellees is still pending in

the Superior Court of DeKalb County and that it is appropriate for the state court proceeding to be concluded before this appeal is heard. The Supreme Court only reviews final judgments or decrees rendered by the highest court of each state. 28 U.S.C. § 1257 (1966). The Georgia courts have not yet considered the ultimate question in this case. As a result, there has been no final judgment in this case from which an appeal may be taken.

The Georgia Supreme Court's decision dealt only with the notice issue and left unresolved the substantive issues in this case for determination at trial. Therefore, the Superior Court of DeKalb County must hear the case and determine whether the Board of Commissioners' rezoning decision was a manifest abuse of discretion. If the

Appellants prevail at trial, the rezoning decision will be invalidated, thereby eliminating any need for this Court to hear this appeal. If the Appellants do not prevail at trial and lose on appeal in the Georgia appellate courts, they will have grounds for another appeal to this Court. The important point is that the substantive issue in this case has not been heard or decided by the Georgia courts. Consequently, this case does not have the requisite finality for appeal to this Court pursuant to 28 U.S.C. § 1257 (1966).

A case on point is San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981). There, appellant San Diego Gas & Electric Company brought suit against the City of San Diego, seeking damages in inverse condemnation. The California Supreme

Court vacated the court of appeal's affirmance of the trial court's award of damages, holding that the exclusive remedy was invalidation of the zoning regulation in an action for mandamus or declaratory relief. On reconsideration, the court of appeal reversed the trial court's award of damages but allowed the plaintiff to retry the case to resolve factual disputes not covered by the trial court relating to the issue of mandamus and declaratory relief. The California utility appealed to this Court, which held that there was no final decision from which an appeal could be taken, stating,

> Ever since this Court's decision in Grays Harbor Co. v. Coats-Fordney Co., 243 U.S. 251, 37 S.Ct. 295, 61 L.Ed. 702 (1917), a state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the

> compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not "final." In such a case, "the remaining litigation may raise other federal questions that may later come here." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 127, 65 S.Ct. 1480, 89 L.Ed. 2092 (1945). This is because "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 163, 94 S.Ct. 407, 412, 38 L.Ed.2d 379 (1973).

450 U.S. at 632, 633.

Similarly, in the case at bar, the trial of this action could well present additional, appealable federal issues since the thrust of Appellant's argument is a substantive due process claim based on the rezoning of the Property, an issue which has yet to be addressed by the trial court. Consequently, if they

lose at trial, Appellants can again appeal to this Court based on the federal issues. This Court should rule, as a matter of law and in the interest of judicial economy, that this case is not currently in a posture for review by this Court. It should be noted that this case does not fall within any of the four narrow exceptions to the finality requirement prescribed in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). See also O'Dell v. Espinoza, 456 U.S. 430 (1982).

Not only is this appeal barred by the finality requirement, but it also offends the Supreme Court's policy of avoiding the premature adjudication of constitutional issues, otherwise known as the "policy of strict necessity in disposing of constitutional issues." See Minnick v. California Department of

Corrections, 452 U.S. 105, 122 (1981); Rescue Army v. Municipal Court, 331 U.S. 549 (1947). As stated above, if the Appellants prevail on the merits of this dispute at trial, the issues presented by this appeal will be moot. This appeal should be dismissed in order to avoid an unnecessary or premature decision on a constitutional issue.

In summary, this appeal does not involve a final decision and should be dismissed. Moreover, dismissal would be in accordance with this Court's policy of avoiding unnecessary and premature decisions on Constitutional issues.

II. There is no Substantial Federal Question

Appellants contend that their due process and equal protection rights have been violated as a result of the failure of the County to give them notice by

mail of the public hearings on the possible rezoning of the Property. This appeal is not the first time this question has been presented to the Court. In each previous case the Court has declined to consider the matter, choosing instead to deny certiorari or to dismiss the appeal for want of a substantial federal question. Several state courts have directly addressed the issue and have held that notice by publication of zoning hearings is constitutionally sufficient.

Perhaps the closest case on point is Karpenko v. City of Southfield, 75 Mich. App. 188, 254 N.W.2d 839 (1977), appeal dismissed (for want of a substantial federal question), 435 U.S. 919 (1978). There, the plaintiffs were neighboring and adjoining property owners of land rezoned to allow construction of a nine

story dormitory. They alleged that their due process rights had been violated since the only notice they received was by publication. The court dismissed plaintiffs' arguments and held that notice by publication was sufficient, adding that "Courts in other jurisdictions have uniformly held that notice by publication is sufficient and lack of individual mailed notice is not a denial of due process. Annot., 96 A.L.R.2d 449, sec. 4, pp. 459-461 and 96 A.L.R.2d Later Case Service, sec. 4, p. 311." 254 N.W.2d at 842. Plaintiffs also argued that they were denied equal protection since they were only provided notice by publication whereas local utilities and railroads were given notice by mail pursuant to the terms of the ordinance. Applying the rational basis test prescribed by this Court for

zoning legislation in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the Michigan court rejected plaintiffs' equal protection claim and upheld the legislation.

Karpenko is one of several state cases holding that notice by publication is a constitutionally sufficient method of notifying all land owners, wherever situated, of public hearings before legislative zoning bodies. See National Boulevard Bank v. County of Will, 112 Ill. App. 3d 608, 445 N.E.2d 891 (1983); Rutland Environmental Protection Association v. Kane County, 31 Ill. App. 3d 82, 334 N.E.2d 215 (1975), cert. denied, 425 U.S. 913 (1976); R. A. Vachon & Son v. City of Concord, 112 N.H. 107, 289 A.2d 646 (1972); Kent v. Borough of Mendham, 111 N.J. Super. 67, 267 A.2d 73 (1970); Blackburn v. Norman

Estates, Inc., 14 Ohio Misc. 88, 232 N.E.2d 442 (1967); Frankland v. Lake Oswego, 8 Or. App. 224, 493 P.2d 163 (1972), modified on other grounds, 267 Or. 452, 517 P.2d 1052 (1973). Each of these cases was decided after the Supreme Court's landmark ruling concerning constitutionally required notice in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and when each of these cases was brought before this Court, the petition for writ of certiorari was denied or the appeal was dismissed for want of a substantial federal question. Passero v. Zoning Commission of Norwalk, 155 Conn. 511, 235 A.2d 660 (1967), cert. denied, 390 U.S. 1004 (1968); Rutland Environmental Protection Association v. Kane County, 31 Ill. App. 3d 82, 334 N.E.2d 215 (1975), cert. denied, 425 U.S. 913

(1976); Karpenko v. City of Southfield, 75 Mich. App. 188, 254 N.W.2d 839 (1977), appeal dismissed, 435 U.S. 919 (1978).

It is hardly unexpected that this Court refused to review these cases considering the peculiarly local nature of zoning and the fact that zoning is a legislative function. Burke v. Board of Representatives, 148 Conn. 33, 166 A.2d 849 (1961); Lawton v. City of Austin, 404 S.W.2d 648 (Tex. Civ. App. 1966). In fact, this Court has consistently demonstrated a reluctance to hear federal constitutional attacks on local zoning ordinances. See, e.g., County of Imperial v. McDougal, 19 Cal. 3d 505, 564 P.2d 14, 138 Cal. Rptr. 472, appeal dismissed, 434 U.S. 944 (1977); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d

342, 20 Cal. Rptr. 638, appeal dismissed, 371 U.S. 36 (1962); Schroeder v. Municipal Court, 73 Cal. App. 3d 841, 141 Cal. Rptr. 85 (1977), appeal dismissed, 435 U.S. 990 (1978); Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (1949), appeal dismissed, 338 U.S. 805 (1949); Golden v. Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), appeal dismissed, 409 U.S. 1003 (1972); City of Raliegh v. Moreland, 247 N.C. 363, 100 S.E.2d 870 (1957), appeal dismissed, 357 U.S. 343 (1958). Each of these zoning cases was dismissed for want of a substantial federal question despite the appellants' constitutional challenges, including freedom of speech, freedom of religion, due process, and equal

protection.

Another indication of the absence of a substantial federal question is the fact that, as stated by the court in Karpenko v. City of Southfield, supra, the state courts are in accord that due process does not require that adjoining or abutting landowners be given actual, mailed notice of public hearings on zoning matters. With regard to the Appellants' equal protection argument, this Court ruled that the rational basis test applies to zoning legislation in Village of Belle Terre v. Boraas, supra. It is difficult to imagine a more rational place for a county to make classifications among recipients of notice of public hearings than at the county's boundary line. As the Supreme Court of Georgia pointed out in its opinion in this case, a contrary

interpretation of the zoning ordinance would "work expansion beyond the normal scope of county ordinances." DeKalb County v. Pine Hills Civic Club, 254 Ga. 20, 21, 326 S.E.2d 214, 215 (1985).

CONCLUSION

Because a final decision is not present for appeal and because no substantial federal question is presented, this Court should not accept jurisdiction of this appeal or, in the alternative, this Court should affirm the decision of the Georgia Supreme Court.

This the 12th day of September, 1985.

Respectfully submitted,

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Pursuant to Rule 28.1 of the Rules of the Supreme Court, Appellees show the Court that corporate Appellee Toco Hill, Inc. has no parent companies, subsidiaries or affiliates.

Furthermore, Appellee The Calibre Company of Georgia, Inc. has no subsidiaries or affiliates but does have a parent company by the name of Calibre Companies, Inc.

CERTIFICATE OF SERVICE

This is to certify that I have this day served Counsel for the Appellants in the foregoing matter with a copy of Appellees' Motion in the Alternative to Dismiss or to Affirm pursuant to Rules 16 and 28 of the Rules of the Supreme Court of the United States by depositing a copy of same in the United States First Class Mail in a properly addressed envelope with adequate postage affixed thereon addressed to:

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